

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

VERONICA B.,

Claimant,

vs.

FAR NORTHERN REGIONAL CENTER,

Service Agency.

OAH No. 2012101164

DECISION

This matter was heard before Administrative Law Judge Susan H. Hollingshead, State of California, Office of Administrative Hearings (OAH), in Chico, California, on April 23, 2013.

The Service Agency, Far Northern Regional Center (FNRC), was represented by Phyllis J. Raudman, Attorney at Law.

Claimant was represented by her mother.

Antonia Fresquez, Spanish language interpreter, translated the proceedings.

Oral and documentary evidence was received. At the conclusion of the hearing, the record was closed and the matter was submitted for decision.

ISSUE

Is claimant eligible for regional center services based on a qualifying condition of autism, mental retardation or “the fifth category” (a disabling condition found to be closely related to mental retardation or to require treatment similar to that required for individuals with mental retardation) pursuant to Welfare and Institutions Code section 4512, subdivision (a), and California Code of Regulations, title 17, section 54000?¹

¹ Unless otherwise indicated, all statutory references are to the California Welfare and Institutions Code.

FACTUAL FINDINGS

1. Claimant is a nine-year-old girl who lives in the family home with her parents, older brother and sister, and her fraternal twin sister. She is bilingual, Spanish and English. Claimant is described as sweet, shy, hardworking and likeable.

2. Claimant's mother testified that she began to notice developmental differences between claimant and her twin sister when they were approximately two years old. Claimant's sister is reported to be performing at grade level while claimant is making slower progress. Claimant has difficulty with tasks such as dressing and tying her shoes. She is difficult to understand and uses short phrases to communicate. She has difficulty retaining information and becomes frustrated when she can't communicate her needs or is forced to do something she does not want to do. She often loses or misplaces things and becomes upset when she can't find them. Claimant's relationship with her siblings has been impacted by her challenging behaviors. She has difficulties relating to other children and tends to isolate or play independently. She has two friends with whom she engages consistently, especially when she is in a positive mood.

Claimant's mother expressed concerns that claimant is sometime sad and depressed, and will sleep a lot and refuse to leave the house. Sometimes she does not want to go to school.

3. According to a FNRC Social Assessment completed on June 5, 2012, by Intake Specialist Julia DeLaRosa, claimant's mother contacted FNRC "due to her concerns regarding [claimant's] development and the school's concern that she is not retaining information. Her mother would like assistance in learning why [claimant] is not advancing and progressing in her studies as well as developmentally."

4. The FNRC Eligibility Review Team met and, after reviewing all available information, determined that claimant did not have a qualifying developmental disability. As a result of this determination, A Notice of Proposed Action (NOPA) was issued on October 3, 2012, informing claimant that FNRC determined she is not eligible for regional center services. The NOPA included the following:

Claimant does not have intellectual disability² and shows no evidence of epilepsy, cerebral palsy, autism, or a disabling condition found to be closely related to intellectual disability or to require treatment similar to that required for individuals with intellectual disability. Eligibility Review (multi-disciplinary team) determined claimant was not eligible for services based on Psychological dated 01/20/12 by Gridley Unified School District. Social Assessment dated 07/25/12 by Julia DeLaRosa, Service

² The terms Intellectual Disability and Mental Retardation are used interchangeably.

Coordinator. Parental input dated 07/25/12 by Julia DeLaRosa, Service Coordinator.

5. On October 12, 2012, claimant's mother filed a Fair Hearing Request disputing claimant's ineligibility.

6. An informal meeting was held on November 14, 2012, between claimant's mother and Larry Withers, FNRC Case Management Supervisor. At that meeting, claimant's mother explained that she disagreed with the Eligibility Review Team decision due to a "lack of independent testing" and her "feeling that [claimant] has a disability that has been missed by educators and other professionals." She believed that FNRC should have completed its own testing instead of relying on testing received from claimant's school district.

7. After this meeting, FNRC agreed to fund an assessment to evaluate claimant's cognitive, adaptive, and behavioral functioning. Licensed Clinical Psychologist Monica Silva, Ph.D. conducted the evaluation on February 1, 2013.

8. In reviewing claimant's eligibility for services, the FNRC Eligibility Team considered information received from Gridley Unified School District (GUSD), including results of a January 2012 Psycho-Educational Study performed by School Psychologist Paul M. Steffy.

9. On March 5, 2012, GUSD held an initial IEP (Individualized Education Program) team meeting to consider claimant's eligibility for special education. At that meeting, Claimant's mother explained that claimant had recently completed neurological testing and was waiting to receive the results. Mr. Steffy also suggested that claimant have audiology testing completed due to her "difficulty with acquisition in basic phonics skills (in comparison to twin sister)." She has a "history of respiratory infections, tonsillitis, etc. that have interfered with discrimination of letter sounds."

The IEP team agreed to postpone the special education eligibility decision pending results of the neurology assessment and audiology exam.

10. The IEP Team reconvened on June 6, 2012, and reviewed the assessment results. A March 23, 2012, audiological evaluation performed by Dr. Lind, revealed normal hearing bilaterally. The neurology assessment completed on January 3, 2012, and reviewed with the parents on March 20, 2012, was also normal. Mr. Steffy noted, "Results of both neurological and audiological assessment were unremarkable (no significant findings). Additional information to consider includes [claimant's] third trimester academic benchmark scores. While [claimant] has made slow and steady progress in all academic areas, her skills continue to fall approximately one year below grade level, despite year long language arts intervention."

11. Mr. Steffy shared findings from the January, 2012, Psycho-Educational Study. The examination included administration of the Woodcock-Johnson III Tests of Achievement and the Wechsler Intelligence Scales for Children (WISC-IV). The Woodcock-Johnson III

Tests of Achievement measures claimant's academic achievement and oral language abilities. The results were summarized as follows:

[Claimant's] oral language skills are low average when compared to the range of scores obtained by others at her grade level. Her oral expression skills are low average; her listening comprehension skills are average. [Claimant's] fluency with academic tasks and her ability to apply academic skills are both within the average range. Her level of academic knowledge is within the low average range.

When compared to others at her grade level, [claimant's] standard scores are average in reading comprehension, broad mathematics, math calculation skills, math reasoning, brief mathematics, and written expression. Her standard scores are low average (compared to grade peers) in broad reading, basic reading skills, brief reading, broad written language, basic writing skills, and brief writing. Her knowledge of phoneme-grapheme relationships is average. No significant strengths or weaknesses were found among the scores for a selected set of [claimant's] achievement areas.

12. Mr. Steffy also administered the WISC-IV and explained that claimant's "overall cognitive ability, as evaluated by the WISC-IV, cannot easily be summarized because her nonverbal reasoning abilities are much better developed than her verbal reasoning abilities. [Claimant's] reasoning abilities on verbal tasks are generally in the Average range (VCI=91), while her nonverbal reasoning abilities are significantly higher but also in the Average range (PRI=106)." The following Composite Scores were reported;

Verbal Comprehension (VCI)	91
Perceptual Reasoning (PRI)	106
Working Memory (WMI)	77
Processing Speed (PSI)	112
Full Scale (FSIQ)	95

Claimant's assessment profile reveals significantly lower auditory working memory in comparison to other areas of assessment

13. At the June 6, 2012 IEP meeting, the team agreed that claimant qualified for special education based on Specific Learning Disability (SLD), "relative processing weakness in auditory working memory (short and long term) and auditory processing (phonemic awareness)."

14. Claimant was referred by FNRC to Licensed Clinical Psychologist Monica Silva, Ph.D. who conducted her evaluation on February 1, 2013, and made the following determination:

DSM-IV-TR DIAGNOSES³

Axis I	Mixed Expressive-Receptive Language Disorder Learning Disorder-Not Otherwise Specified (Auditory Processing Issues) Rule Out Depressive Disorder-Not Otherwise Specified Rule Out Anxiety Disorder-Not Otherwise Specified
Axis II	No Diagnosis on Axis II
Axis III	Rule Out Sensory Integration Disorder
Axis IV	Social and Educational Issues, Issues with Primary Support Group
Axis V	GAF: 55

15. Dr. Silva administered the WISC –IV and was impressed with claimant’s “work ethic and focus as she tackled the tasks presented. She worked slowly and carefully and there were no issues noted with impulsivity or distractibility. However, there was a significant discrepancy noted between the various subtest scores and though [claimant] appeared to put forth appropriate effort on all of the subtests presented, some of the tasks were easier for her to complete than others.”

The following Composite Scores were reported;

Verbal Comprehension (VCI)	85
Perceptual Reasoning (PRI)	102
Working Memory (WMI)	74
Processing Speed (PSI)	103
Full Scale (FSIQ)	88

³ The Diagnostic and Statistical Manual of Mental Disorders, Fourth Edition, Text Revision (DSM-IV-TR) is the current standard for diagnosis and classification. It is a multi-axial system which involves five axes, each of which refers to a different domain of information as follows:

Axis I	Clinical Disorders Other Conditions That May Be a Focus of Clinical Attention
Axis II	Personality Disorders Mental Retardation
Axis III	General Medical Conditions
Axis IV	Psychosocial and Environmental Problems
Axis V	Global Assessment of Functioning

16. The diagnostic criteria for “Mental Retardation” as set forth in section 4512 is defined in the Diagnostic and Statistical Manual of Mental Disorders, Fourth Edition, Text Revision (DSM-IV-TR) to require:

A. Significantly subaverage intellectual functioning: an IQ of approximately 70 or below on an individually administered IQ test...

B. Concurrent deficits or impairments in present adaptive functioning (i.e., the person’s effectiveness in meeting the standards expected for his or her age by his or her culture group) in at least two of the following areas: communication, self-care, home living, social/interpersonal skills, use of community resources, self-direction, functional academic skills, work, leisure, health, and safety.

C. The onset is before 18 years.

17. Dr. Silva agreed with Mr. Steffy’s assessment that claimant’s “nonverbal reasoning abilities are much better developed than her verbal reasoning abilities.” She found that claimant’s “unique set of thinking and reasoning abilities make her overall intellectual functioning difficult to summarize by a single score” on the WISC-IV. She explained that claimant’s Verbal Comprehension score is in the low average range, Perceptual Reasoning is average, Working Memory is borderline, and Processing Speed is average, with a low average Full Scale IQ. “The results of the WISC-IV need to be interpreted with caution in light of the significant discrepancy noted between the various subtest scores; however, they likely provide a fair estimate of [claimant’s] day-to-day cognitive functioning and are largely congruent with results of a previous WISC-IV administered in January, 2012.”

Dr. Silva concluded that claimant “does not present with the global cognitive delays characteristic of an Intellectual Disability (formally [*sic*] Mental Retardation) or Borderline Intellectual Functioning. Her day-to-day adaptive challenges are likely related to a Language-Based Learning Disorder, as well as emotional and behavioral issues.”

18. The Autism Diagnostic Observation Schedule-Second Edition (ADOS-2) is a standardized, semi-structured observation assessment tool which allows examiners to observe and gather information regarding an individual’s social behavior and communication in a variety of different social communication situations. Significant scores do not automatically imply that an individual has autism but that its presence is a reasonable possibility. Dr. Silva utilized Module III to assess claimant, based on her verbal abilities.

19. DSM-IV-TR section 299.00, Autistic Disorder, states:

The essential features of Autistic Disorder are the presence of markedly abnormal or impaired development in social interaction

and communication and a markedly restricted repertoire of activity and interests. Manifestations of the disorder vary greatly depending on the developmental level and chronological age of the individual... The impairment in reciprocal social interaction is gross and sustained. . . The impairment in communication is also marked and sustained and affects both verbal and nonverbal skills.

To diagnose Autistic Disorder, it must be determined that an individual has at least two qualitative impairments in social interaction; at least one qualitative impairment in communication; and at least one restricted repetitive and stereotyped pattern of behavior, interests, or activities. One must have a combined minimum of six items from these three categories. In addition, delays or abnormal functioning in at least one of the following areas, with onset prior to age three, is required: (1) social interaction, (2) language as used in social communication, or (3) symbolic or imaginative play.

20. Claimant did not meet this criteria. Dr. Silva concluded:

Although [claimant] presents with difficulties communicating and socializing in a age-appropriate fashion as well as challenging behaviors and emotional issues. . . based on the results of the current evaluation, an interview with [claimant's] mother, a review of records and the criteria for Autistic Disorder . . . [claimant] does not present with the marked impairments and atypicalities in socialization, communication, and stereotyped behaviors and restricted interests characteristic of Autistic Disorder. [Claimant] presents with a unique and complicated clinical picture that is difficult to summarize. In this examiner's opinion, the issues she is currently exhibiting are related to a Language Disorder which may be best characterized by a diagnosis of Mixed Expressive-Receptive Language Disorder, as well as a Learning Disorder-Not Otherwise Specified. In addition, she presents with symptoms of Anxiety and Depression which need to be further assessed and treated. Furthermore, she appears to struggle with possible issues related to Sensory Integration which merit further assessment and treatment. The aforementioned issues likely account for the day-to-day behavioral and emotional challenges [claimant] is currently experiencing.

21. After this additional testing was completed, FNRC informed claimant's parent by letter dated February 26, 2013, that the regional center was upholding its original decision which found claimant ineligible for services. It was suggested that "the discrepancy between claimant's verbal comprehension and working memory scores point to a learning disability rather than global mental retardation. A learning disability is not an eligible condition for services from Far Northern Regional Center."

22. Lisa Benaron, M.D., FAAP, FACP, is the Medical Director for FNRC and has extensive experience evaluating consumers for regional center eligibility. Dr. Benaron explained the requirements to qualify for regional center eligibility and reviewed and explained the testing results from both School Psychologist Mr. Steffy, and Dr. Silva.

Dr. Benaron testified that based on claimant's assessment results, it is evident that "she has the ability to learn, but that her working memory is a problem and will get in her way in learning." She explained to claimant's mother that because claimant has a learning disability her progress may be slower. She "hasn't caught up but is progressing...it will take time. The important thing is she can do well in life." Dr. Benaron opined that the Full Scale IQ is not a good representation of claimant's abilities because the Working Memory score lowers the Full Scale score.

She discussed the DSM-IV criteria noting that claimant scored "well below the cut-off for an Autism Spectrum Disorder" and does not have significantly subaverage intellectual functioning as required for a diagnosis of mental retardation. Dr. Benaron stated that the issues claimant is experiencing are more attributed to her learning disability.

23. In addressing eligibility under the "fifth category" " (A Disabling Condition Found to be Closely Related to Mental Retardation or to Require Treatment Similar to Mental Retardation), the Court in *Mason v. Office of Administrative Hearings* (2001) 89 Cal.App.4th 1119, 1129, stated in part:

...The fifth category condition must be very similar to mental retardation, with many of the same, or close to the same, factors required in classifying a person as mentally retarded. Furthermore, the various additional factors required in designating an individual developmentally disabled and substantially handicapped must apply as well.

24. Dr. Benaron testified that a condition closely related to mental retardation would require the essential feature of sub-average general intellectual functioning, accompanied by significant deficits in adaptive skills including, but not limited to, communication, learning, self-care, mobility self-direction, capacity for independent living, and economic self-sufficiency. The eligibility team must demonstrate that these substantial adaptive deficits are clearly related to cognitive limitations and must not be the result of mental health issues, learning disabilities or physical conditions.

Claimant did not demonstrate a degree of global intellectual impairment similar to that possessed by persons with mental retardation. And, her adaptive difficulties appear to derive from her learning disabilities. There was no evidence that treatment required for learning disabilities would be the same or similar to that required by individuals with mental retardation.

25. Dr. Benaron testified that claimant has difficulties with language, Spanish and English, and learning disabilities. She was also concerned claimant might have issues with

anxiety and depression. She explained that often children struggling in school will “take it hard and become depressed or frustrated.” However, claimant does not meet the criteria for an Autism Spectrum diagnosis or mental retardation. There was no evidence of cerebral palsy, epilepsy, or a disabling condition found to be closely related to mental retardation or to require treatment similar to that required for individuals with mental retardation.

26. After information was presented, claimant’s mother understood that claimant did not qualify for regional center services. Dr. Benaron offered some suggestions to assist claimant and she and claimant’s mother agreed to meet informally at the conclusion of this hearing for further discussion.

LEGAL CONCLUSIONS

1. Pursuant to the Lanterman Act, Welfare and Institutions Code section 4500, et seq., regional centers accept responsibility for persons with developmental disabilities. Welfare and Institutions Code section 4512 defines developmental disability as follows:

“Developmental disability” means a disability that originates before an individual attains age 18 years, continues, or can be expected to continue, indefinitely, and constitutes a substantial disability for that individual....[T]his term shall include mental retardation, cerebral palsy, epilepsy, and autism. This term shall also include disabling conditions found to be closely related to mental retardation or to require treatment similar to that required for individuals with mental retardation [commonly known as the “fifth category”], but shall not include other handicapping conditions that are solely physical in nature.

2. California Code of Regulations, title 17, section 54000, further defines the term “developmental disability” as follows:

(a) “Developmental Disability” means a disability that is attributable to mental retardation, cerebral palsy, epilepsy, autism, or disabling conditions found to be closely related to mental retardation or to require treatment similar to that required for individuals with mental retardation.

(b) The Development Disability shall:

(1) Originate before age eighteen;

(2) Be likely to continue indefinitely;

(3) Constitute a substantial disability for the individual as defined in the article.

(c) Developmental Disability shall not include handicapping conditions that are:

(1) Solely psychiatric disorders where there is impaired intellectual or social functioning which originated as a result of the psychiatric disorder or treatment given for such a disorder. Such psychiatric disorders include psycho-social deprivation and/or psychosis, severe neurosis or personality disorders even where social and intellectual functioning have become seriously impaired as an integral manifestation of the disorder.

(2) Solely learning disabilities. A learning disability is a condition which manifests as a significant discrepancy between estimated cognitive potential and actual level of educational performance and which is not a result of generalized mental retardation, educational or psycho-social deprivation, psychiatric disorder, or sensory loss.

(3) Solely physical in nature. These conditions include congenital anomalies or conditions acquired through disease, accident, or faulty development which are not associated with a neurological impairment that results in a need for treatment similar to that required for mental retardation.

3. Welfare and Institutions Code section 4512, subdivision (1), defines substantial disability as:

(1) The existence of significant functional limitation in three or more of the following areas of major life activity, as determined by a regional center, and as appropriate to the age of the person:

- (1) Self-care.
- (2) Receptive and expressive language.
- (3) Learning.
- (4) Mobility.
- (5) Self-direction.
- (6) Capacity for independent living.
- (7) Economic self-sufficiency.

4. California Code of Regulations, title 17, section 54001, provides:

(a) "Substantial disability" means:

(1) A condition which results in major impairment of cognitive and /or social functioning, representing sufficient impairment to require interdisciplinary planning and coordination of special or generic services to assist the individual in achieving maximum potential; and

(2) The existence of functional limitation, as determined by the regional center, in three or more of the following areas of major life activity, as appropriate to the person's age:

- (1) Receptive and expressive language.
- (2) Learning.
- (3) Self-care.
- (4) Mobility.
- (5) Self-direction.
- (6) Capacity for independent living.
- (7) Economic self-sufficiency.

(b) The assessment of substantial disability shall be made by a group of Regional Center professionals of differing disciplines and shall include consideration of similar qualification appraisals performed by other interdisciplinary bodies of the Department serving the potential client. The group shall include as a minimum a program coordinator, a physician, and a psychologist.

(c) The Regional Center professional group shall consult the potential client, parents, guardians/conservators, educators, advocates, and other client representatives to the extent that they are willing and available to participate in its deliberations and to the extent that the appropriate consent is obtained.

Handicapping conditions that consist solely of psychiatric disorders, learning disabilities or physical conditions do not qualify as developmental disabilities under the Lanterman Act.

2. It was not disputed that claimant has language and learning disabilities. However, regional center services are limited to those individuals meeting the stated eligibility criteria. The evidence presented did not prove that claimant's current impairments resulted from a qualifying condition which originated and constituted a substantial disability before the age of eighteen. There was no evidence to support a finding of autism, mental retardation or a condition closely related to mental retardation, or requiring treatment similar to that required for individuals with mental retardation. It was not established that claimant has cerebral palsy or epilepsy. Accordingly, she does not have a developmental disability as defined by the Lanterman Act.

3. Claimant does not meet the eligibility requirements for services under the Lanterman Act and is therefore not eligible for services through FNRC.

ORDER

Claimant's appeal from the Far Northern Regional Center's denial of eligibility for services is denied.

DATED: May 4, 2013

SUSAN H. HOLLINGSHEAD
Administrative Law Judge
Office of Administrative Hearings

NOTICE

This is the final administrative decision in this matter. Each party is bound by this decision. An appeal from the decision must be made to a court of competent jurisdiction within 90 days of receipt of the decision. (Welf. & Inst. Code, § 4712.5, subd. (a).)